(4)

Supreme Court, U.S.
FILED
OCT 24 1997
CLERK

No. 97-422

In The
Supreme Court Of the United States
October Term, 1997

BENJAMIN M. ANDERSON,
Petitioner,

v.

SAMUEL W. PANOS,
an individual;
KATHRYN DOBRINIC,
in individual capacity;
MICHEAL SHEELEY,
in individual capacity;
JAMES VAZZI,
in individual capacity;
BOATMEN'S NATIONAL BANK OF CENTRAL ILLINOIS (Now NATIONS BANK);
COFFEEN STATE BANK AND TRUST COMPANY (Now ILLINI BANK), a Corporation;
Respondents.

SUPPLEMENTAL REPLY TO BRIEF IN OPPOSITION

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6 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether a person who pleads guilty to a misdemeanor and is placed on conditional discharge is deemed in custody for purpose of being able to apply for a writ of habeas corpus.

(Petitioner adopts Respondents Question 1)

2. Whether a person who was illegally convicted, but who was never been able to bring a habeas corpus action because he was never in custody, is that person required by the holding of Heck v. Humphrey, to have the conviction set aside before pursuing a Title 42 §1983 claim, for money damages for serious constitutional violations such as 1) Guilty plea being obtained by coercion and duress, 2) An alleged totally false and fabricated transcript of the sentencing hearing which transcript shows that he was advised of various constitutional and procedural rights 3) Payment of restitution that in no way or manner is related to the offense charge with 4) Search without consent or search warrant of the property of the person convicted as well as the search of separate property of his father and adult daughter, and further the concealing of the search of these properties, 4) undisputed payment of substantial fine and restitution, as part of the criminal conviction.

3. Whether Heck v. Humphrey, 512 U.S. 477, 114 S.Ct. 2364, 129 L.E.d.2 383 (1994) bars a suit under 42 U.S.C. §1983 which allegedly, does not impeach the validity of the plaintiff's conviction which has not been vacated.

(Petitioner adopts Respondents Question 3)

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SUPPLEMENTAL REPLY TO BRIEF IN OPPOSITION

I. REASON FOR THIS SUPPLEMENTAL BRIEF IS TO ADVISE OF THE STRIKING OF THE TRIAL COURT'S CERTIFICATE OF CORRECTNESS PERTAINING TO TRANSCRIPT OF SENTENCING HEARING OF JANUARY 12, 1995

On pages 3 and 4 of Petitioner's Reply To Brief In Opposition, it was set forth that after the writ of certiorari was filed, it became known that without notice to Petitioner or to Petitioner's counsel, and without being indexed or properly indexed in the court record, and without notice to the Appellate Court Of Illinois, the trial Judge issued on August 21, 1997, a certificate of correctness on the transcript of sentencing hearing of January 12, 1995. On page 4 it is noted:

> "Petitioner has filed in the aforesaid appellate court a motion to set aside or strike said certificate of correctness, but to date same has not been ruled on."

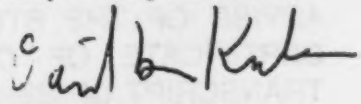
I first became aware that my motion to strike was allowed upon receiving notice of the October 22, 1997, Court Order from the Appellate Court of Illinois, Fifth District,

The holding of the Appellate Court as set forth on page 2 of it's Order (App 2) is as follows:

> "Inasmuch as the trial court cannot amend the January 12, 1995, transcript, which is in the nature of an exhibit filed in support of the motion for relief from judgment, it likewise cannot certify to it's correctness."

A reproduction of the full Order is included herewith in the appendix.

Respectfully submitted



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App 1

FILED
OCT 21 1997
LOUIS E. COSTA
CLERK, APPELLATE COURT, 5th DISTRICT

No. 5-97-0487

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the Circuit
	) Court of Montgomery
Plaintiff-Appellee,	) County.
	)
v.	)
	) No. 93-CF-10
BENJAMIN M. ANDERSON,	)
	)
Defendant-Appellant.	)

ORDER

This cause has been considered on defendant's motion to strike the trial court's certification of correctness of a transcript of proceedings conducted on January 12, 1995; and the court being advised in the premises, finds:

That on August 18, 1997, defendant filed a motion in this court for an extension of time to file the record on appeal. Defendant explained in his motion that additional time was required to enable the trial court to consider a motion to correct record filed in that court pursuant to Supreme Court Rule 329. Specifically, defendant wanted the trial court to correct the January 12, 1995, transcript to reflect defendant's absence from the courtroom during the guilty plea proceedings. On September 16, 1997, this court denied defendant's motion. The order contained the following pertinent language regarding the nature of the transcript and the inability of the trial court to entertain a

Supreme Court Rule 329 motion to correct:

> "That the fundamental flaw in defendant's resort to Supreme Court Rule 329 is that he seeks to correct an exhibit rather than a transcript. Given the context of the section 2-1401 proceedings, the transcript of the guilty plea proceedings can only be viewed as an exhibit relating to the petition for relief from judgment. In other words, the trial court must take note of that exhibit as a prelude to granting or denying any relief with respect to it. In turn, the reports of proceedings relating to this appeal, as contemplated by Supreme Court Rule 323, are the transcripts of the hearings on the motion to dismiss the petition and on the motion for reconsideration. The only question for this court to determine on appeal is whether the trial court erred in dismissing the section 2-1401 petition, not whether the January 12, 1995, transcript of proceedings is the product of a conspiracy. In essence, defendant is attempting to use Supreme Court Rule 329 as a means of presenting this court with a record different from that presented to the trial court."

The trial court went on to certify the correctness of the transcript on August 21, 1997, while the motion for extension of time was pending in this court and before it had the benefit of this court's September 16, 1997, order. Inasmuch as the trial court cannot amend the January 12, 1995, transcript, which is in the nature of an exhibit filed in support of the motion for relief from judgment, it likewise cannot certify to its correctness.

IT IS THEREFORE ORDERED that defendant's motion to strike certification of correctness shall be, and the same hereby is, GRANTED.